BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF RICHARD S. KLOVER, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 80-150 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER

This matter, an appeal from the denial of an application to appropriate surface water of the State of Washington, came before the Pollution Control Hearings Board, Nat W. Washington, presiding, at a formal hearing in Vancouver, Washington on November 10, 1980.

Appellant represented himself. Respondent Department of Ecology was represented by Assistant Attorney General Wick Dufford. Reporter Kim Otis recorded the proceedings.

The Board having considered the exhibits, records and files herein, and having reviewed the Proposed Order of the presiding

officer mailed to the parties on the 10th day of April, 1981, and more than twenty days having elapsed from said service; and

The Board having received exceptions to said Proposed Order from the appellant and the Board having considered the exceptions and denying same, and being fully advised in the premises, NOW THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Proposed Order containing Findings of Fact, Conclusions of Law and Order dated the 10th day of April, 1981, and incorporated by reference herein and attached hereto as Exhibit A, are adopted and hereby entered as the Board's Final Findings of Fact, Conclusions of Law and Order herein.

DATED this 11th day of June, 1981.

POLLUTION CONTROL HEARINGS BOARD

Nat W. Washington

NAT W. WASHINGTON, Chairman

David Akana

DAVID AKANA, Member

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF RICHARD S. KLOVER, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 80-150 PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, an appeal from the denial of an application to appropriate surface water of the State of Washington, came before the Pollution Control Hearings Board, Nat W. Washington, presiding, at a formal hearing in Vancouver, Washington, on November 10, 1980.

Appellant represented himself. Respondent Department of Ecology was represented by Assistant Attorney General Wick Dufford. Reporter Kim Otis recorded the proceedings.

Having heard or read the testimony, having examined the exhibits, and having considered the contentions of the parties, the Pollution

EXHIBIT A

Control Hearings Board makes these

FINDINGS OF FACT

I

On April 30, 1979, appellant filed an application with the Department of Ecology (hereinafter "DOE" or "respondent") to appropriate .22 cubic feet per second (cfs) from the White Salmon River to irrigate 8 acres in the NW 1/4 of the SW 1/4 of the NW 1/4 of Section 11, Township 6 North, Range 10 E.W.M. The point of diversion and the land sought to be irrigated are located a few miles upstream from the small settlement of Trout Lake.

The property which the appellant wishes to irrigate consists primarily of low lying, slightly boggy, forested river bottom land. The land is marginal for crop production, but crops could be produced with proper management. The water applied for is for a beneficial use.

Appellant's application was denied by DOE because it was concluded that the reach of the White Salmon River upstream of Section 31, Township 6 North, Range 11 E.W.M. is overappropriated, that further appropriation upstream of Section 31 would compound water shortages already occurring and would further impair the rights of existing users, and that the issuance of the permit would be contrary to the public interest.

During the hearing appellant indicated that he could get along with .13 cfs.

II

The Trout Lake Water Company (hereinafter "TLWC") on behalf of its

shareholders filed a letter of protest against appellant's application claiming there is insufficient water in the river to satisfy existing rights.

III

The president of TLWC, who was expected to be present and testify as one of respondent's chief witnesses, failed to show up for the hearing. Consequently, respondent's case at the hearing had to rest almost completely on theoretical assumptions based for the most part on river flow records from a single gauging station, and on unsupported hearsay statements set forth in four water right claims covering the TLWC and Little Mountain Ditch (hereinafter "LMD") diversions. THe key theoretical assumption was that since the average minimum flow for August and September at the U.S. Geological survey gauging station on the White Salmon River near the settlement of Trout Lake, located in the SE 1/4 of Section 24, Township 6 North, Range 10 E.W.M. (hereinafter "Section 24 gauging station") was only about 68 cfs and that since the downstream irrigators claim the right to divert 70 cfs (17 cfs at LMD and 53 cfs at TLWC), that the reach of the river above the TLWC diversion in the NE 1/4 of the NE 1/4 of Section 31, Township 5 North, Range 11 E.W. was ipso facto overappropriated and that river flow below the TLWC diversion of 53 cfs was ipso facto too small to support necessary instream uses including fish habitat. The chief testimony supporting respondent's theory was hearsay testimony of its inspector about a conversation with the president of TLWC regarding water shortages alleged to have occurred in the Trout Lake

valley at a time or times in the past, which had caused irrigators to utilize a plan for taking turns in using the water.

The hearsay testimony regarding the statements made by the president of TLWC was sketchy and of limited probative value. It was silent as to such matters as the underlying causes and extent of the shortages; the years and times of year of the occurrences; the identity of the points of diversion at which the shortages occurred; the amount of water being diverted at the various points of diversion; the river flow characteristics above and below the TLWC diversion at such times; and the number of acres being irrigated.

It is recognized that had the president of TLWC been present to testify and possibly provide documentary evidence that many of the questions might have been answered.

IV

The respondent's evidence of low minimum flows in the Trout Lake Valley reach of the river consisted primarily of discharge records for 1929, 1930, 1931, 1958, 1959 and 1960 (Exhibits R-8 and R-9), taken at Section 24 gauging station which is upstream from the points of diversion of the TLWC and LMD. The records for these seven years indicated that the average annual minimum flow was about 68 cfs, and that the low flows were all in the months of August and September, with five low flows being in September and two in August.

V

The appellant contends that there is more than enough water flowing into the Trout Lake Valley reach of the river to provide

sufficient water to irrigate 4500[1] acres and still leave enough for fish habitat and other instream uses. The appellant's evidence of the low flows for August and September consisted primarily of discharge records (Exhibit A-1) for 1961 through 1968 from the Trout Lake Creek gauging station located in the SW 1/4 of Section 15, Township 6 North, Range 10 E.W.M. (hereinafter "TLC gauging station") and discharge records (Exhibit A-2) from the White Salmon River gauging station located above the confluence with Trout Lake Creek in the SE 1/4 of the SE 1/4 of Section 3, Township 6 North, Range 10 E.W.M. (herainafter "Section 3 gauging station"). The records for these eight years indicated that the average annual minimum flow for August and September from these two streams at points, located only a few miles above Section 24 guaging station was about 197 cfs. The low flows were all in September except one at Trout Lake Creek which was in August.

VI

Gotchen Creek shown on Exhibit R-2 enters the White Salmon River from the west at a point in Section 24 which is above the Section 24 gauging station. The evidence does not show the amount of water contributed to the White Salmon River by this creek during the August-September low flow period.

---

1. Exhibit R-8 at page 326 (B-Z Corner discharge records) shows that 4,500 acres were being irrigated in the Trout Lake Valley above B-Z Corner.

VII

Exhibit R-2 indicates that Cave Creek enters the White Salmon River below Section 24 gauging station at about where water is diverted for the LMD and well above the point of diversion for TLWC, but it provides no information as to the amount of water it contributes.

VIII

Exhibit R-8 shows that the gauging station at B-Z Corner (hereinafter "B-Z gauging station") in the NW 1/4 of the SW 1/4 of Section 1, Township 4 North, Range 10 E.W.M., which is less than two miles below the southerly most land irrigated by the TLWC diversion, recorded an average minimum flow of 367 cfs for August and September of 1958, 1959, and 1960. For the same period the Section 24 gauging station records (Exhibit R-8) show an average minimum flow of only about 85 cfs.[2] This shows a flow increase of about 282 cfs in just a few miles. Exhibit R-2 indicates that although there are a few small streams entering the White Salmon River between the B-Z gauging station and the TLWC diversion, that there is no major tributary to account for the greatly increased flow.

IX

The evidence as to existing rights and the amount of water

---

2. The low minimum flow figure of 68 cfs relied on by DOE results when the minimum flow records in 1929, 1930 and 1931 (Exhibit R-9) are taken into consideration.

presently being appropriated consisted primarily of four water right claims filed pursuant to chapter 90.14 RCW. These claims were filed by TLWC (No. 008081) which is served by the TLWC diversion, and by John Van Nortwich and Hazel Van Nortwick (No. 00942), Spencer L. Frey and Erma Frey (No. 009541), and Leornard Schmid and Elizabeth J. Schmid (No. 009543) all of whom are served by the LMD diversion.

These claims in the aggregate, as of 1974, assert that 2490[3] acres were being irrigated, that the annual acre feet of water used was 10,258, and that the maximum instantaneous diversion was 70 cfs. The average water duty as computed from these figures is about 4.12 acre feet.

X

When respondent's inspector investigated appellant's application on June 30, 1980, he estimated that a combined total of about 70 cfs was being diverted by the LMD and TLWC diversions.

XI

Even though the annual precipitation is high, the use of irrigation water is also high (about 4 acre feet per acre). The irrigation return flow to the White Salmon River is also high.

XII

The average annual precipitation at the U.S. Forest Service Ranger Station on the White Salmon River, a few miles northerly of the Trout

---

3. U.S. Geological survey records (respondent's Exhibit R-8) indicate that only about 1400 acres were being irrigated in 1962.

Lake Valley and at an elevation only slightly higher, is about 36 inches. The precipitation may be slightly less in the irrigated area of the valley.

XIII

No evidence was presented indicating that minimum or base flows have been established on the White Salmon River under chapters 90.22 and 90.54 RCW for the protection of fishery habitat and other instream uses. It does not appear from the evidence that either the Department of Fisheries or Department of Game has ever placed the White Salmon River high on the priority list for such protection.

XIV

No evidence was presented that either the Department of Fisheries or the Department of Game filed written objections to appellant's application as authorized by RCW 75.20.050.

XV

On the basis of the river flow figures and irrigation withdrawals testified to by the respondent's inspector, the Department of Game witness expressed objection to appellant's application for diversion. The Department of Game witness gave no testimony regarding river flow characteristics below the Section 24 gauging station or below the TLWC diversion. His chief concern regarding appellant's proposed withdrawal was on its effect on fishery habitat in the reach of the river immediately below appellant's proposed diversion. He pointed out that technically if all irrigators used 70 cfs, the river bed would be dry below the TLWC diversion but that due to the return flows testified to by respondent's inspector that this was not happening.

XVI

The documentary evidence introduced by the respondent raises a serious question as to the acreage of land under irrigation from the TLWC and LMD diversions. Exhibits R-4, R-5, R-6 and R-7 when combined show an acreage of 2490 in 1974 as being diverted by the TLWC and LMD diversions below the Section 24 gauging station. On the other hand Exhibit R-8, the report of the U.S. Geological survey, shows that a total of 4500 acres was under irrigation above B-Z Corner, and that about 3100 acres were under irrigation above the Section 24 gauging station. This leaves only about 1400 acres under irrigation by the TLWC and LMD diversions which divert below the Section 24 gauging station. The U.S. Geological survey report is dated 1962, but there is no indication in the evidence that irrigated acreage has expanded since that time, although this is a possibility.

The total irrigated acreage of 4500 acres as set forth in the U.S. Geological survey report has been utilized in this decision, unless otherwise noted. The 1400 acre figure is used here because it comes from a disinterested official source.

XVII

The circumstances that an average minimum flow of 197 cfs enters the upper end of Trout Lake Valley immediately above the irrigated area in August and September and during the same period of time an average minimum flow of 367 cfs flows out of the lower end of the Valley, as measured at B-Z Corner, a short distance below the irrigated area, when considered with the other circumstances indicated by these Findings of Fact, raises a question as to the correctness of

DOE's determination that there is insufficient water in the White Salmon River to allow appellant to divert 22 cfs. A further and more complete disucssion of the Findings of Fact is attached hereto as Attachment A.

XVIII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board makes these

CONCLUSIONS OF LAW

I

The burden of proof was on the appellant to establish that the DOE erred in denying his application. This he failed to do. However, the evidence presented by the appellant along with some of the evidence presented by DOE itself does raise serious questions as to whether the decision of DOE was correct, even though it falls short of establishing that it was wrong.

II

The Department of Ecology in its investigation of appellant's application may have received sufficient information to support the findings and conclusions set forth in the report of examination (Exhibit R-1); but the evidence introduced in the de novo hearing on appellant's appeal, raises a substantial question as to whether the decision to deny appellant's application was correct. Appellant's application (No. S4-26242) and the order denying it should therefore be remanded to DOE for further consideraton. State Ex Rel. Gunstone

v. Highway Commission 72 Wn.2d 673 (1966),[4] Stempel v. Department of Water Resources 82 Wn.2d 109 (1973).

II

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

---

4. In remanding a decision of the State Highway Commission for further consideration the Court in Gunstone; at page 675 stated:

> "A remand for further consideration is not a determination that the State Highway Commission is wrong; but it is an indication that the disinterested court, which has reviewed the record, is not satisfied on the basis of that record that the State Highway Commission is right."

ORDER

Appellant's application (No. S4-26242) to appropriate public waters of the state and the order denying it are remanded to the Department of Ecology for further consideration.

DONE this 10th day of April, 1981.

POLLUTION CONTROL HEARINGS BOARD

Nat W. Washington

NAT W. WASHINGTON, Chairman

ANALYSIS AND DISCUSSION OF

FINDINGS OF FACT

The amount of water involved in this matter is exceedingly small, but the issue presented is highly important. The practical effect of denying this very small diversion is to declare the White Salmon River system in the Trout Lake Valley and above to be absolutely closed to further appropriation. Such an important decision should not be made while substantial questions still remain unanswered.

The evidence as presented at the hearing raises unanswered questions and leads often to inconsistent and irreconcilable conclusions, as is shown by the following analysis and discussion of the Findings of Fact.

I

Since the president of TLWC did not appear to testify, DOE was forced to rest its case almost entirely on a few old records of the river flows at the Section 24 gauging station (Exhibits R-8 and R-9) which showed an average minimum flow of only about 68 cfs during August and September and water right claims filed under the provisions of chapter 90.14 RCW which showed that as of 1974, LMD and TLWC together claimed to be diverting water at the rate of 70 cfs within a distance of about one and one-half miles below the gauging station.

Theoretically, this evidence would seem to establish that the reach of the river at and above the TLWC diversion is overappropirated and that the reach of the river below the diverions would have insufficient water during the low flow period of August and September to provide for suitable fish habitat and other instream uses.

Such theoretical low flows may have actually taken place, but no evidence other than indefinite hearsay was presented at the hearing to show that such low flows, in fact, have developed or have threatened to develop.

II

That low flows at and below the TLWC diverion are merely theoretical is strongly suggested by respondent's own Exhibit R-8. This exhibit shows that after providing irrigation water for about 4500 acres of land in the Trout Lake Valley, that the average minimum flow in the White Salmon River during August and September at the B-Z gauging station is about 367 cfs. The station is located less than two miles below the southerly most land irrigated from the TLWC diversion. It is difficult to reconcile the high flow at B-Z Corner with respondent's contention that there is insufficient flow at the TLWC diversion to meet reasonable irrigation and instream needs. Reconciliation is particularly difficult because a very small part of the great increase in flow can be accounted for by the few small tributary streams shown on the Exhibit R-2.

A partial explanation of the high flow at B-Z gauging station is suggested by the testimony of respondent's inspector which was that due to soil and geological conditions, water use for irrigation is high in the Trout Lake Valley and that return flows to the river are also high. A substantial portion of the return flow may return to the river only a short distance above the B-Z gauging station. However, the evidence introduced at the hearing does not rule out the reasonable possibility that a substantial portion of the return flow

measured at the B-Z gauging station enters the river below the Section 24 gauging station in sufficient quantity to provide adequate stream flows for irrigation, fish habitat and other instream uses at, and immediately below, the TLWC diversion, the critical point on the river under DOE theory.

This evidence which points toward sufficient water in the White Salmon River to support existing irrigation as well as proper fish habitat and other instream uses in the Trout Lake Valley reach of the river, while strong, is not conclusive. It does, however, raise serious questions which were not answered by the evidence presented at the hearing. Had the president of TLWC testified, he might well have been able to give direct testimony which would have answered these questions.

III

The case presented by appellant, like that presented by DOE, also rested largely on old stream flow records. The old records from the TLWC gauging station (Exhibit A-1) and from the Section 3 station on the upper White Salmon River (Exhibit A-2) show that an average minimum flow of about 197 cfs plus the flows from Gotchen and Cave Creeks is available in the White Salmon River system during August and September for irrigating about 4500 acres and for domestic stock watering and instream uses.

The water right claims (Exhibts R-4, R-5, R-6 and R-7) and the testimony of DOE's inspector indicate that about 4 acre feet is diverted for each acre irrigated from the LMD and TLWC diversions. Although there was no specific testimony regarding water use for

irrigating about 3100 acres from the diversions above Section 24 gauging station, it may be assumed for the purpose of this discussion that the duty would be about 4 acre feet per acre as was the case for the LMD and TLWC diversions.

On the assumption that 4 acre feet is the reasonable duty for the entire 4500 acres, about 18,000 acre feet would be diverted during a 168 day irrigation season. This number of acre feet could be diverted by continuously diverting only about 54 cfs. Thus, after water has been diverted for the irrigation of about 4500 acres, the river, theoretically, should still be carrying about 143 cfs plus the flow from Gotchen and Cave Creeks, plus return flows from irrigation. Accordingly, this substantial amount of water (143 cfs), less a small amount diverted for domestic and stock watering purposes would theoretically be left in the river below the TLWC diversion for fish habitat and other instream uses during the low flow period of August and September.

Theoretically, this evidence would seem to establish that there is enough water in the river at and below the TLWC point of diversion to allow appellant's requested upstream diversion of 22 cfs. Such a theoretical high flow immediately below the TLWC diversion may actually occur during the August-September low water period but no evidence that such high flows in fact have been occurring was presented at the hearing.

IV

That appellant, like respondent, may have based his case on theory rather than fact is suggested by the flow records of the Section 24

gauging station which recorded an average minimum flow of only about 68 cfs for the low flow period of August and September, with a claimed downstream irrigation demand of about 70 cfs.

Although the evidence that 70 cfs is, in fact, being diverted below the Section 24 gauging station during the low flow period of August and September is highly questionable, it was not proven to be wrong by the evidence. There is a strong possibility that irrigation return flows greatly increased the flow of the river above and immediately below the TLWC diversion, but this was not clearly established by the evidence.

Thus, the evidence that there is sufficient flow in the White Salmon River in and above Section 31, Township 6 North, Range 10 E.W.M. to allow appellant to divert 22 cfs, though strong, is by no means conclusive. It does however raise serious questions which were not answered by evidence presented at the hearing.

V

An analysis of Exhibits R-4, R-5, R-6 and R-7, the water right claims associated with TLWC and LMD diversions, indicate that the 2490 acres asserted to be under irrigation could receive the claimed diversion of 10,258 acre feet by diverting at a rate much below the claimed diversion rate of 70 cfs.

At the claimed maximum rate of diversion (70 cfs) the TLWC and LMD can divert a maximum of about 138.843 acre feet per day. With a 168 day irrigation season from April 15 to October 1, the total of about 23,325 acre feet can be diverted, yet present use amounts only to about 10,258 acre feet. The total number of acres claimed to actually

be irrigated is 2490.[1] Thus, if the full 70 cfs were to be diverted, each acre would receive about 9.37 acre feet, which would appear to be an unreasonable amount, and is, in fact, not claimed. Since it would not be practical to irrigate 24 hours per day, continuously for 168 days, the actual number of acre feet produced by 70 cfs would be somewhat less than 9.37.

The total acre feet claimed to be used, as set forth in the four water right claims, is 10,258 or 4.12 acre feet per acre. This amount of water can theoretically be secured by diverting only about 31 cfs, but, since it is not practical to irrigate 24 hours per day, continuously for 168 days, and since the irrigation season may be less than 168 days, the actual instantaneous diversion would probably be somewhat higher.

Although the diversion rate of 31 cfs is theoretical, it does raise a serious queston and does suggest the possibility that the irrigation needs of TLWC and LMD could be served during the low water months of August and September with a diversion considerably smaller than 70 cfs.

VI

The DOE inspector estimated that about 70 cfs was being diverted when he made his inspection of June 3, 1980. The records indicate that this is not usually a period of low flow. A diversion of this

---

1. U.S. Geological survey records (respondent's Exhibit R-8) indicated that only about 1400 acres were being irrigated from these diversions in 1962.

magnitude toward the end of the growing season is at least subject to questions, particularly since there was no evidence presented as to the kinds of crops being grown or the water duty required for the growing of such crops. A further reason to question the likelihood of the diversion of 70 cfs during the period of minimum flow is the fact that if 70 cfs were to be constantly diverted during an irrigation season of 168 days, each of the 2490 acres claimed to be under irrigation would receive over 9 acre feet of water.

If, in fact, 70 cfs is being diverted at the TLWC and LMD diversions for extended periods of time, a question is raised as to whether or not proper water conservation methods are being practiced as required by RCW 90.03.005 and the tenants of western water law.

VII

There was no testimony suggesting that more than a reasonable amount of water is being diverted from the river reach in question. However, the records of Trout Lake Creek and Section 3 gauging stations show an average minimum flow of 197 cfs a short distance upstream from irrigation diversions for about 3100 acres, while the records from the Section 24 gauging station show an average minimum flow of only about 68 cfs a short distance below these diversions. A reduction in flow of this magnitude by the irrigators above the TLWC and LMD diversions for such a small irrigated acreage and some domestic and stock water use points to the distinct possibility of overuse of water in violation of the tenants of western water law and RCW 90.03.005. It is recognized that overuse of water may not be the

reason for the unusually high reduction in stream flow. It may possibly be the result of natural causes; such as a gravel formation which allows much of the water to flow underground so that it is not measured at the Section 24 gauging station. Nevertheless, this is a question that needs to be answered.

VIII

The publication entitled Western Washington Instream Resources Protection - A Proposed Program (draft) prepared by the Water Resources Policy Development Section, Washington State Department of Ecology, dated January 11, 1979, sets forth in table 2 at page 5 a composite priority listing by the Departments of Fisheries and Game relating to Western Washington streams needing instream flow protection. The White Salmon River-Wind River Systems as a unit were placed next to the last among 23 stream systems being given priority ratings.

It would seem logical that the priority rating of the Departments of Fisheries and Game would have been much higher if, in fact, the minimum flows are as low as DOE infers. The priority rating is certainly not evidence, but it does add weight to other circumstances which suggest that this matter should be returned to DOE for further consideration.[2]

---

2. The draft Environmental Impact Statement for Western Washington Instream Resources Protection Program dated April 1979, in table 2, page 9, which gives the priority rating of 25 river systems places the Wind-White Salmon River systems next to the last.

IX

Another reason to question the diversion rate of 70 cfs is that the records of the U.S. Geological Survey indicate that only about 1400 acres are being irrigated from the TLWC and LMD diversions. At a duty of 4 acre feet per acre, this would only require a total of 5600 acre feet. In a 168 day irrigation season this amount could theoretically be diverted at a rate of only about 17 cfs. At a rate of 70 cfs it would take only 92 days to divert 5600 acre feet.

A diversion of only about 17 cfs would leave at least about 50 cfs in the river below the TLWC diversion during the minimum flow period of August and September even without return flows and without the flow from Gotchen and Cave Creeks. These figures are theoretical, but they do raise questions as to the validity of the theoretical figures relied on by the respondent.

The evidence as to whether 2490 or 1400 acres is being irrigated under the evidence introduced by the respondent at the hearing has left it unclear as to whether 2490 or 1400 acres are being irrigated under the TLWC and LMD diversions. Upon remand, this question can be resolved by utilizing recent aerial photographs which are probably available in the Klickitat County Agricultural Stabilization and Conservation Office of the U.S. Department of Agriculture.